UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

MARQUETTE UNIVERSITY

Employer

and **Case 30-RD-1374**

ISAAC B. GYAMENAH

Petitioner

and

LOCAL 1, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

Union

DECISION AND ORDER

This is my determination as to the appropriateness of the present decertification petition.[1] The only issue before me is whether a contract bar was in place at the time the petition was filed. The position of the Employer, and Petitioner, is that no contract bar exists because, absent the ratification the parties understood to be required, no contract existed at the time the petition was filed. The Union's position is that the acceptance of the Employer's proposal by a Union representative, two days prior to the filing of the petition, was not conditioned upon ratification

[1] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The parties stipulated, and I find, that Marquette University is engaged in the business of operating an educational institution, and that during the past calendar year, a representative period, the Employer received gross revenues available for operating expenses in excess of one million dollars. During that same period the Employer, in the course and conduct of its business operations, purchased and received goods or services valued in excess of $5,000 that originated outside the State of Wisconsin. 3. Local 1, Service Employees International Union, AFL-CIO, CLC (Union) claims to represent certain employees of the Employer. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. 4. A question affecting commerce does not exist concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

and as a result a contract bar was in place from that date. I find the Union's position persuasive. For the reasons described below a valid contract bar was in place on October 17, 2003[2] and therefore the petition is properly dismissed.[3]

Discussion

The Employer is a private, non-profit educational institution located in Milwaukee, Wisconsin. The unit at issue consists of custodians, previously represented by SEIU Local 150, but recently transferred to the Union.[4] The previous collective bargaining agreement covering the custodians expired August 30.

Prior to the expiration of the previous collective bargaining agreement the Union and Employer met and entered into negotiations for a new agreement.[5] The first meeting was held on August 5. During negotiations Associate Vice President for Human Resources Stephen Duffy represented the Employer in his role as chief labor negotiator and chief labor representative. Union representative Burke Wortman represented the Union throughout the bargaining sessions. Between August 5 and the final bargaining session on September 18, the parties met several times, at times in the presence of a mediator from the Federal Mediation and Conciliation Service. Wortman left the final session on September 18 with the Employer's final offer, a complete and full contract containing the proposals the parties had agreed upon, initialed by both sides.

[2] All dates refer to 2003.
[3] Timely briefs from the Employer and Union have been received and duly considered.
[4] The parties stipulated that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part time custodians employed by the Employer at its Milwaukee, Wisconsin facilities; excluding casual employees, service managers, all other employees, and guards and supervisors as defined in the Act.

[5] During these negotiations the agreement was extended once, for thirty days, creating a new expiration date of September 28.

Wortman became unavailable to continue in his role shortly after the final bargaining session. Responsibility for bargaining was assumed by Dan Iverson, a Vice-President of the Union, who had supervised Wortman. On October 15, Iverson accepted the Employer's offer of September 18 unconditionally and sent a letter to Duffy, including attachments that delineated the scope of the agreement, explaining as much. The body of the letter read, in its entirety:

> This is to confirm that we have accepted your final offer for a new agreement, a copy of which is attached hereto. Except as modified by your attached offer, all terms of the prior agreement will remain in the new agreement.

Duffy received the letter the following day, October 16. The petition at issue was filed one day later, October 17. The contract was ratified by the membership on October 21, and the Employer began implementation shortly after.

The Union has challenged the appropriateness of the petition on the grounds that the Board's contract bar doctrine was applicable from the date of Iverson's acceptance, or at a minimum from the date of Duffy's receipt of the Union's acceptance. The Employer and Petitioner contend that the parties understood, from discussions during bargaining and past history, that until the membership ratified, contract acceptance was only conditional, and that a ratification vote would take place shortly. They argue that because this ratification did not take place until October 21, well after the filing of the instant petition, contract bar principles are inapplicable.

Analysis

The burden of proving that a contract bar exists is on the party asserting the contract bar doctrine. *Roosevelt Memorial Park*, 187 NLRB 517, 518 (1970). The Board has established a very specific set of requirements for determining whether a contract bar exists in a situation such as this, where the period between agreement and ratification is punctuated by the filing of an

otherwise valid petition. This rule, contained in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), and affirmed by subsequent decisions, is as follows:

> Where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

The analysis therefore begins and potentially ends with a single point; does the agreement at issue contain an express provision for contract ratification?[6]

In the present case the Employer has not argued that the contact contains an express provision requiring contract ratification. The only provision in the accepted proposals, and portions of the previous contract incorporated into these proposals, that mentions ratification is a provision of the Employer's wage offer that originally called for a $125.00 "ratification bonus." This provision did not make it to the final proposal accepted by the Union, inasmuch as the parties had agreed to simply incorporate this amount into the wage scale and the "ratification" language therefore had been crossed out and the deletion initialed. The "final wage offer" provision as contained in the final agreement between the Union and the Employer was signed by both parties and dated September 18 had slash marks through the ratification bonus language and contained handwritten language saying "No Signing Bonus." Although the Employer argues this provision has value as a piece of evidence indicating an understanding exists, even the Employer does not contend that this deleted provision alone can be interpreted as an express requirement of ratification. In neither brief nor during the hearing did the Employer suggest any other portion of the agreement could be interpreted as an express requirement.

[6] The Board's contract bar doctrine has requirements beyond the ratification aspect. These other areas include the requirements that the parties must have both signed the agreement that creates the alleged bar, the document must contain substantial terms and conditions of employment, and there must not be confusion regarding the terms upon which the parties have agreed. See *Gaylord Broadcasting*, 250 NLRB 198 (1980), *Branch Cheese*, 307 NLRB 239 (1992), *Waste Management of Maryland*, 338 NLRB No. 155 (2003). These contract bar elements are not at issue in this case.

Based on the position taken in brief, and the testimony elicited at the hearing, the Employer's argument is not that the contract explicitly requires ratification, but instead that under the totality of the circumstances, including bargaining history and the requirements of the Union's bylaws and constitution, ratification was understood to be a requirement prior to final acceptance. Whether the Employer is correct in this position is not relevant to the decision in this matter, for this is precisely the type of factual dispute that the Board sought to avoid in crafting the *Appalachian Shale* rule. *Id.* at 1162. In representation cases involving a contract bar the Board has consistently limited its inquiry to the four corners of the document alleged to bar an election. *Waste Management of Maryland,* 338 NLRB No. 155, slip op. at 2 (2003), quoting *United Health Care Services*, 326 NLRB 1379 (1998). As a practical matter this has involved excluding the consideration of extrinsic evidence. *Id.*, quoting *Jet-Pak Corp*., 231 NLRB 552 (1977) (limiting inquiry into whether contract required ratification for contract-bar purposes to the face of the documents and excluding parole evidence); *Union Fish Co*., 156 NLRB 187, 191-192 (1965) ("The Board has consistently held that the 'legality of a contract asserted as a bar is to be determined in representation proceedings from the face of the contract itself and that extrinsic evidence will not be admitted ....").

In its explanation of the rule the Board specifically articulated the concern that attempting to discern the alleged understanding of the parties led to protracted hearings and conflicting testimony, and that this only created contested factual issues for the Board to resolve, a situation that was in conflict with the Board's stated intention that every effort should be made to eliminate the litigation of factual issues in representation cases, and instead give greater weight to the language of the contract itself. *Appalachian Shale* at 1162.

Therefore, it is not necessary to address the persuasiveness of the Employer's arguments regarding the parties' understanding, Iverson's obligation under the Union's bylaws or

constitution or any other issue raised by the Employer outside of whether the contract contains an express requirement of contract ratification. I find that the contract was offered and accepted prior to October 17, and that all of the elements required under the Board's contract bar doctrine are present: both parties have signed the agreement, the document contains substantial terms and conditions of employment, and there is no confusion regarding the terms upon which the parties have agreed. I also find that the contract itself contains no express provision for prior ratification as required by *Appalachian Shale*. As such the current collective bargaining agreement between the Employer and the Union serves as a contract bar to an election, the decertification petition at issue is untimely and properly dismissed.

ORDER

It is hereby ordered that the petition filed herein be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by December 5, 2003.**

Signed at Milwaukee, Wisconsin on November 21, 2003.

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